St. Luke Lutheran Home for the Aging *and* District 1199/SEIU, AFL–CIO, the Healthcare and Social Service Union. Case 8–CA–26053

May 24, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On October 19, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, St. Luke Lutheran Home for the Aging, North Canton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(a).

''(a) Reinstate and maintain the terms and conditions of employment in existence in November 1993, prior to the Respondent's unilateral assignment of employees in the bargaining unit represented by the Union to the Waterford facility.''

2. Insert the following as paragraph 2(b), and reletter the subsequent paragraphs accordingly.

''(b) Provide the Union with advance notice of and an opportunity to bargain about any reassignment of unit employees to work at the Waterford and, on request of the Union, bargain in good faith with the Union about any such assignment.''

3. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel has excepted to the judge's failure to provide restoration of the status quo ante. We find merit to the exception and modify the Order and notice accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with District 1199/SEIU, AFL–CIO, the Healthcare and Social Service Union, concerning the assignment of our employees in the bargaining unit represented by the Union to facilities other than the St. Luke Lutheran Home for the Aging.

WE WILL NOT unilaterally assign our employees in the unit represented by the Union to facilities other than the St. Luke Lutheran Home for the Aging without giving prior notice to the Union of any new assignment and an opportunity to bargain about it.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate and maintain the terms and conditions of employment in existence in November 1993, prior to the Respondent's unilateral assignment of employees in the bargaining unit represented by the Union to the Waterford facility.

WE WILL provide the Union with advance notice of and an opportunity to bargain about any reassignment of unit employees to work at the Waterford and, on request of the Union, bargain in good faith with the Union about any such assignment.

ST. LUKE LUTHERAN HOME FOR THE AGING

Rufus L. Warr, Esq., for the General Counsel.
Karen Soehnlen McQueen, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Alliance, Ohio, on August 18, 1994, pursuant to charges timely filed on January 10 and February 23, 1994, and a complaint issued on February 24,

1994, alleging Respondent violated Section 8(a)(5) and (1) of the Act by assigning employees represented by the Union to work at a location where they had not previously been assigned; did not give the Union prior notice or opportunity to bargain on the assignment; and refused to bargain on the subject when the Union requested such bargaining. Respondent contends the assignment was in accord with the management rights and waiver clauses in the existing collective-bargaining agreement and does not violate the Act. It is a close question, but I am persuaded by the evidence presented that the unilateral assignments of employees here involved without notice, bargaining, or opportunity to bargain being given to the Union did violate the Act as alleged.

On the entire record, and after considering the credibility of the witnesses and the able arguments of counsel for the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all material times Respondent, a nonprofit Ohio corporation, with an office and place of business in North Canton, Ohio, has been engaged in the operation of a nursing home and an extended care facility and in conducting these business operations annually derives gross revenues in excess of $100,000 therefrom, and purchases and receives at its North Canton, Ohio facility goods valued in excess of $50,000 directly from points outside the State of Ohio. At all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE RELEVANT FACTS

The Union and the Respondent executed a collective-bargaining agreement effective October 25, 1993,[1] and expiring October 25, 1995. The certified bargaining unit covered by this agreement consists of:

> All full-time and regular part-time service and maintenance employees including nurses aides, licensed practical nurses, dietary employees, social workers, clerical employees, housekeeping employees, laundry employees and maintenance employees, but excluding executive secretary, human resources assistant, professional employees, guards and supervisors as defined in the Act.

In early December, the Respondent commenced assigning unit employees to perform the services at a newly constructed facility called the Waterford which is separately incorporated as an independent living facility for elderly adults and is connected to the St. Luke building by a walkway. Employees so assigned bid for the jobs which are of the same nature with the same duties as those at St. Luke, and they are paid in accord with and receive all the benefits provided by the Union's collective-bargaining agreement with St. Luke. The Waterford has no employee payroll. The employees assigned punch in and out at St. Luke. According to Jane Leonhard, Respondent's director of human resources, the assignment of employees to the Waterford has resulted in the addition of 10 new employees to the bargaining unit.

I do not credit the testimony of Leonhard or Kim Frankeberger, Respondent's administrator, to the effect there is a contract for services between St. Luke and the Waterford. No such contract was proffered in evidence and Leonhard concedes that she merely believes there is such a contract, does not know what is in it, and that the assignments to the Waterford are based on the Respondent's position it can assign St. Luke employees anywhere.

The Waterford was under construction during the negotiation of the October 25 agreement. Rick Kepler, the Union's negotiator, credibly testified that during the negotiations he asked what the relationship between St. Luke and the Waterford would be, and more particularly, would the St. Luke employees have to work at the Waterford when it opened. To this the Respondent's attorney replied that the Waterford was a totally independent operation not to be discussed during the St. Luke's negotiation and that Respondent would not discuss what was going to happen at the Waterford. Kim Frankeberger was present during all the St. Luke negotiations. He testified that Respondent refused to discuss the employment situation at the Waterford, stated it was a separate entity, and insisted the negotiations were to be limited to St. Luke's employees. Pressed by General Counsel on cross-examination, Frankeberger became evasive, first testifying the Union had during the negotiations expressed concern about the possible assignment of St. Luke employees to the Waterford, then testifying the Union had not done so. I do not credit Frankeberger's retreat from his first version, nor do I credit his assertion that during the negotiations the Union stated, in haec verba, ''we want to negotiate about employees at the Waterford as employees of the Waterford.''

Respondent has offered no good reason for its curt response to the Union's inquiry concerning the prospective staffing of the Waterford. It's witnesses are either lacking in credibility, in the case of Frankeberger, or, in the case of Leonhard, offer nothing to explain why the Respondent was reluctant to advise the Union of its plans for the Waterford. The answer, I conclude, is that the Respondent knew that upon the completion of the Waterford, which was connected to St. Luke by a walkway, it would use St. Luke employees to staff the Waterford; but did not want to bargain with the Union concerning that assignment. This is not bargaining in good faith.

Upon learning of the assignment of St. Luke employees to the Waterford, Becky Williams, the union agent servicing the unit employees, told Frankeberger she considered there had to be negotiations concerning the assignments. Frankeberger's response was that the Respondent had a contractual right to make the assignments. The positions of the parties are clearly shown by an exchange of letters between Williams and Frankeberger in December. On December 17, Williams sent the following letter to Frankeberger:

> Dear Mr. Frankeberger,
>
> At the last Labor Management meeting you informed us that you are going to use bargaining unit employees to do work at the Waterford.

[1] All dates are 1993 unless otherwise specified.

Through out negotiations St. Luke repeatedly took the position that they would not negotiate over any issues with respect to the Waterford. The reason consistently given was that St. Luke and the Waterford were two separate ''entities.''

Since you now plan to use bargaining unit employees to do work at the Waterford, the Union is demanding negotiations over your decision to now use union workers at the Waterford.

It is the position of the Union that the Employer does not have the right to unilaterally decide to have employees work at the Waterford after taking the position that such work was beyond the scope of bargaining.

If you have any questions please call me at (614) 461–1199.

Sincerely,

/s/Becky Williams
Organizer

Frankeberger replied by letter of December 21 as follows:

Dear Ms. Williams:

I received your fax concerning the use of St. Luke Lutheran Home employees at The Waterford. As I explained at our Labor/Management Committee meeting, St. Luke has contracted with The Waterford to provide certain services. Article Three of our Collective Bargaining Agreement clearly gives St. Luke the authority to assign and direct the work of its employees. The employees continue to be employed by St. Luke and are assigned pursuant to the Collective Bargaining Agreement.

If you have any questions, please let me know.

Sincerely,

/s/Kim Frankeberger
Administrator

The Respondent contends its assignment of St. Luke employees to work at the Waterford is permitted by the following clauses in the collective-bargaining agreement:

ARTICLE THREE

MANAGEMENT RIGHTS

Except as expressly modified, abridge or restricted by a specific provision of this Agreement, the employer exclusively retains all statutory and inherent managerial rights, prerogatives, and functions in the conducting of business and the directing of the work force. Management rights, in accordance with its sole and exclusive judgment and discretion, shall include, but not be limited to: determining the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work; to promote, demote, transfer, lay-off, recall to work, reprimand, suspend, discharge or otherwise, discipline employees, determine their qualifications and assign and direct their work; to promote, demote, transfer, lay-off, recall to work, reprimand, suspend, discharge or otherwise discipline employees; to relieve employees from duties; to change existing or introduce new or improved production methods at the facility, labor saving devices, or equipment; to alter or discontinue any operation or product; to select suppliers; to maintain the efficiency of operations; to set the starting and quitting times and number of hours and shifts to be worked; to set the standards of productivity and the services to be rendered; to use independent contractors to perform work or services; subcontract, contract out, close down, or relocate the employer's operations or any part thereof; to expand, reduce alter, combine, transfer, assign, or cease any job, department, operation or service; to issue, amend and revise policies, rules, regulations, and practices; and to take whatever action is either necessary or advisable to determine, manage, fulfill the mission of the employer and to direct the employer's employees. The employer's failure to exercise any right, prerogative, or function hereby reserved to it, or the employer's exercise of any such right, prerogative, or function in a particular way, shall not be considered a waiver of the employer's right to exercise such right, prerogative, or function or prelude it from exercising the same in some other way not in conflict with the express provisions of this Agreement. The employer will not exercise these rights in an arbitrary or capricious manner.

ARTICLE THIRTY TWO

WAIVER

The parties acknowledge that during the negotiations which resulted in this Agreement, each had unlimited right and opportunity to make demands and proposals with respect to all proper subjects of collective bargaining; all such subjects have been discussed and negotiated upon, and the agreements contained in the Agreement were arrived at after free exercise of such rights and opportunities. Therefore, the employer and the union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

IV. DISCUSSION AND CONCLUSIONS

I am convinced Respondent knew when it was negotiating the St. Luke agreement that St. Luke employees would be used to service the Waterford, and that Respondent deliberately evaded the Union's effort's to explore the prospective staffing at the Waterford in order to conceal this plan.

When the Respondent commenced the assignment of St. Luke employees to the Waterford, it obviously changed their working conditions. Such changes are mandatory subjects of bargaining. The Respondent contends, however, that it had the right to so assign under the management-rights clause, and, further, that the Union waived any rights it had to bargain on the assignment of unit employees to the Waterford by agreeing to the waiver clause.

Turning first to the management-rights clause as it relates to the assignment of employees,[2] and mindful that the Union's right to be consulted about changes in terms and conditions of employment is a statutory right and not one obtained by a contract,[3] I am of the opinion that the clause must be read in context with the rest of the agreement which nowhere suggests unit employees are subject to assignment outside the St. Luke facility. The Respondent's contention that the references to assignment of work in the management-rights clause constitute an agreement that permits assignment anywhere the Respondent chooses, inside or outside of St. Luke premises, is an argument suggesting the clause is ambiguous and therefore subject to various interpretations. If that is so, then the risk of ambiguity falls on the Respondent who raises the clause as justification for the assignments here at issue.[4]

More importantly, the Respondent arbitrarily removed the issue of assignment to Waterford from the negotiation agenda by flatly refusing to discuss anything pertaining to the Waterford facility on the ground that its operation had nothing to do with negotiations concerning wages, hours, and working conditions of St. Luke employees.

I do not believe that either the management-rights clause or the waiver clauses bar the Union from bargaining on the assignment of St. Luke employees outside the boundaries of the St. Luke facility. The assignment of employees is patently a mandatory subject of bargaining which the Union has a statutory right to negotiate. Any waiver of that right must be clear and unmistakable,[5] must have been fully discussed and consciously explored during negotiations, and consciously yielded before a waiver can be found.[6] Here, the matter was never discussed at all because the Respondent chose not to reveal the possibility, probability, or, more likely, certainty that St. Luke employees would be utilized at the Waterford, all in order to cloak its intention to assign St. Luke employees to the Waterford. By doing so, the Respondent effectively led the Union to believe the Waterford operation would not raise any problems with which it, as the St. Luke employees' representative, should be concerned. Having so assured the Union, the Respondent may not now be heard to say the Union consciously, clearly, or unmistakably waived its statutory right to bargain over the Waterford assignments. In short, the Respondent cannot mislead the Union with regard to the possibilities St. Luke employees could be involved at Waterford, which it effectively did by brusquely asserting the Waterford operation had nothing to do with St. Luke employees, and then claim the Union waived discussion of such possibilities when they arise. I am persuaded Respondent did not meet its statutory obligation[7] to give prior notice to and confer in good faith with the Union concerning the assignment of the employees to the Waterford. Accordingly, I conclude and find the Respondent has failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act by not giving the Union prior notice of and without affording the Union an opportunity to bargain concerning the assignments to the Waterford before the assignments took place, and by refusing via its letter of December 21 to bargain with the Union regarding the assignments already made. Such conduct reasonably tends to interfere with, restrain, and coerce employees in the exercise of their statutory right to form, join, or assist labor organizations.

With respect to Respondent's contention it need not bargain over a job assignment that does not affect the compensation or job security of the affected employees, I first note the cases on which it relies for this argument (*NLRB v. King Radio Corp.*, 416 F.2d 569 (10th Cir. 1969), and *Office Employees Local 425 v. NLRB*, 419 F.2d 314 (D.C. Cir. 1969)), are distinguishable. Moreover, it is well settled that an administrative law judge is bound to follow Board precedent. *Iowa Beef Packers*, 144 NLRB 615 (1963).

I further find that adoption of the Respondent's position that its action in this case was permissible would amount to a license to send unit employees anywhere the Respondent desired, something clearly not contemplated by the Union in bargaining and a goal of Respondent hidden by its failure and refusal to truthfully advise the Union, during negotiations, of either its intent to assign unit employees to the Waterford or the possibility this might come about. To place the employees in the unstable and unpredictable position the Respondent contends is appropriate is obviously to their detriment.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the certified collective-bargaining representative of the Respondent's employees in a unit covered by a collective-bargaining agreement effective October 25, 1993, and expiring October 25, 1995.

4. The Respondent violated Section 8(a)(5) of the Act by assigning bargaining employees in the above-described unit to work in a facility other than that of the Respondent without prior notice to the Union and without affording the Union an opportunity to bargain with respect to that conduct and its effects.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain with the Union concerning the Respondent's assignment of unit employees represented by the Union to a facility called the Waterford which is not the Respondent's facility.

6. The aforesaid violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

---

[2] The Board may interpret collective-bargaining agreements in the course of deciding unfair labor practice cases. *Mining Specialists*, 314 NLRB 268 fn. 5 (1994).

[3] *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 423, 428, 430 (1967).

[4] Compare *Westinghouse Electric Corp.*, 278 NLRB 424, 434 (1986).

[5] *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963).

[6] See, e.g., *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989); *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985).

[7] Sec. 8(d) of the Act requires, among other things, that the Respondent and the Union ''meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.''

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, St. Luke Lutheran Home for the Aging, North Carnton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally assigning employees in the unit represented by the Union to work in facilities other than those of the Respondent without giving the Union prior notice and an opportunity to bargain concerning those assignments and their effects.

(b) Refusing to bargain with the Union on request concerning the Respondent's assignment of its bargaining unit employees to work at facilities other than those of the Respondent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the assignment of employees in the unit represented by the Union to the Waterford and any facilities not occupied by the Respondent.

(b) Post at its place of business in North Canton, Ohio, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''